Nos. 22399 and 22399A

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. PEARSON,

Appellant,

vs.

ROBERT W. HEISER, and SANDRA STAMPER,

Appellees.

Appeal From the United States District Court,
Central District of California.

BRIEF FOR APPELLEE ROBERT W. HEISER.

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I.
Factual Statement.

In essence this suit involves a collision between two motorboats in the middle of a lake, at night, under conditions of unlimited visibility. It is unusual in that, although the lights of both boats were fully operative and functioning, neither operator appears to have seen the other boat in advance of the collision, or, indeed, at the time of the collision itself. The facts, briefly stated, are as follows:

Appellant Pearson and appellee Stamper were part of a group of American Airlines employees who had been engaged in water skiing and other recreational activities in the vicinity of Three Dunes Camp Ground on the Arizona shore of Lake Havasu, from the early morning hours of May 21, 1965, until shortly after dusk [F.

3].* They were joined that afternoon by appellee Heiser who, when the time came to leave, offered the use of his boat to carry part of the group back to their camp near Black Meadow Landing, on the California side of the lake, roughly three-quarters of a mile (3,750 feet) away [F. 4, 5]. A stewardess, Penny Hicks, and two pilots, Messrs. Cherbak and Schonning, joined Heiser in his boat. The rest of the party, consisting of Misses Van Horne, Kelley and Stamper and Mr. Blaney, left the Arizona shore in Mr. Pearson's boat [F. 5].

Mr. Pearson left first, sitting at the wheel of his boat with the three girls sitting to his right in the front seat [F. 6, R. 37]. Mr. Blaney was in the back. Shortly, thereafter, the Heiser boat passed it en route to Black Meadow Landing. Mr. Heiser sat at the right side of the front seat behind the wheel with Mr. Cherbak to his left [R. 297]. Mr. Schonning was crouching near the engine box behind them half leaning on the front seat [R. 265]. Miss Hicks was asleep on the rear seat [R. 210]. Having passed the Pearson outboard, the Heiser boat continued on to the immediate vicinity of the beach at Black Meadow Landing and was preparing to land when, as will be seen below, it turned about and came out again.

In the interim, when the Pearson boat was perhaps one-half of the way across, Mr. Blaney complained that he had lost his hat [F. 10]. Mr. Pearson turned his boat about and proceeded on a reverse course away from Black Meadow Landing with those on board looking for the hat [F. 10]. After some distance, he

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*Legend:
F. Finding Fact
R. Reporter's Transcript of Proceedings
C. Conclusion of Law
P. Br. Pearson Brief
Ex. Exhibit

made another 180° turn and proceeded back on his original course towards Black Meadow Landing. Those on board continued to look for the hat [F. 10, R. 84-86].

In the meantime, the occupants of the Heiser boat, at Black Meadow Landing, observed that the Pearson boat was not behind them where they had expected to see it. Instead, it appeared to the two pilots and to Mr. Heiser to be in the middle of the lake, either dead in the water or turning very slowly [F. 11]. At that point, Messrs. Schonning and Cherbak expressed concern for their friends, and Mr. Heiser turned his boat about and proceeded out to render assistance. He accelerated gradually [R. 222] on a direct course heading slightly to the rear of the point where he had last seen Pearson's lights [R. 227], ultimately reaching a speed of about 20-23 m.p.h. [F. 11]. Approximately one minute after the Heiser boat left the beach, at a point approximately 900 to 1,000 feet north of Black Meadow Landing, the two boats came into collision [F. 12, 13].

Three passengers in the Pearson boat, Misses Van Horne and Kelley and Mr. Blaney were killed. Appellee Stamper suffered serious personal injuries. Pearson and Heiser received only slight injuries [F. 14].

The court found that the Heiser boat had approached Pearson's from a direction of between 10 to 30 degrees to Pearson's right [F. 16]. It found further that the running lights and stern light of Heiser's boat were fully operative and lighted [F. 15]; that at no time after turning his boat to search for the hat, up to and including the time of collision, did Pearson see the Heiser boat or its lights [F. 17]; and, finally, that at the time of, and prior to, the collision Pearson's attention

was directed predominantly to his left and he was not keeping a proper lookout [F. 16].

II.

The Court's Finding That Appellant Failed to Keep a Proper Lookout Was Based on Substantial Evidence.

A brief review of appellant's specification of errors and the arguments advanced to support them makes it clear, we believe, that this appeal really involves but a single question: whether or not the trial court's finding that Mr. Pearson failed to keep a proper lookout was clearly erroneous. We will address ourselves to that question at the outset, therefore. The various other specified "errors" will be discussed *infra* at p. 10, *et seq.*

The most striking feature of this case, as we have noted, is that two boats, both properly lit, collided at night under conditions of unrestricted visibility, and that at no time during the period when both boats were on converging courses did the operator of either see the other boat. The conclusion which flows from these facts is obvious. Judge Learned Hand stated it in *The Salutation,* 79 F. 2d 609 (2d Cir. 1935), in these terms:

> "[I]t is fairly apparent that for two vessels to get so close on a clear night, without seeing each other, is alone strong antecedent reason for supposing that both must have been careless."
>
> *Id.* at 611.

In sum, when one fails to see what is there to be seen, and which one has a duty to look for, it is a fair conclusion, indeed the only conclusion absent some satisfactory explanation, that the person was not keeping a proper lookout.

This fact was not lost to appellant's counsel who, at the outset of trial, undertook to establish "conclusively"

that there *was* an explanation [R. 19]. The explanation offered was that the lights on Heiser's boat were so situated that, when the bow rose in the water as power was applied on the run out from Black Meadow Landing, they became invisible to those in the Pearson boat. Appellant's evidence came in the form of testimony from two marine surveyors, Mr. Arthur DeFever and his assistant, Mr. Sinclair. These gentlemen testified in substance that when the bow of the Heiser boat, a *1964* Chris-Craft, rose to an angle of 8.5° from horizontal, the running lights (but not the stern light) were screened from view to those ahead by the projection of the stem of the boat [R. 356, 317 *et. seq.,* Ex. P. 43].

During examination it developed that the experiments upon which this testimony was based were performed in a *1963* Chris Craft on the waters of San Diego Bay, with the 186-pound Mr. Sinclair sitting in the rear seat to simulate the weight of Miss Hicks[1] [R. 354, 348, 376]. The instruments used were a carpenter's level, a plastic ruler, and a package of Wrigley's Spearmint gum; the latter for purposes of determining the angle of inclination of the boat at rest [R. 344, 435]. Runs were made in two directions at various speeds and the angle of inclination measured. The procedure followed was for Mr. Sinclair to hold the carpenter's level in a horizontal plane with one end resting on the boat's exterior decking, while with the other hand he held the plastic rule in an effort to measure the distance from the free end of the level to the deck with an accuracy of .01 inch [R. 436, 439 *et seq.*]. It was conceded on cross-examination that the runs were not repeated in order to verify the findings by obtain-

[1]Miss Hicks weighed approximately 110 pounds [R. 376, 377].

ing reproducable results [R. 449]. When the measurements were completed, the data was plotted as a curve on a graph from which Mr. DeFever was able to determine that at speeds of from 15 to 20 m.p.h. the angle of inclination exceeded 8.5° [Ex. P. 43 at 18, 7]. It was conceded by Mr. Sinclair on cross-examination that they had not obtained sufficient data points to verify the curve as plotted [R. 456-458].

Rebuttal evidence took several forms. Mr. Richard Wetmore, also a marine surveyor, testified that a 1964 Chris Craft identical to Mr. Heiser's, with the weight and location of Mr. Heiser's passengers duplicated exactly, was operated at various speeds outbound from Black Meadow Landing at Lake Havasu [R. 570 *et seq.*]. Motion pictures were taken from an outboard motorboat similar to Mr. Pearson's located at approximately the point of collision. They corroborated Mr. Wetmore's testimony that the Chris Craft's running lights were visible at all speeds.

Mr. James Poe, an engineer from the Christ Craft Corporation, testified to the following:

(1) That all Chris Craft boats undergo extensive testing prior to being placed on the market [R. 537];

(2) That among these tests was one designed to measure a boat's maximum angle of inclination at various speeds [R. 537];

(3) That in 1963 and 1964 such tests were performed with boats identical to Mr. Heiser's using a measuring device with verified accuracy to within 3.3/60th of a degree [R. 537, 540, 544]; [photographs of which were introduced as Exs. H. 11 - H. 14].

(4) That these tests established that the maximum inclination recorded at any speed was 5° 30′ [R. 546]. (Mr. DeFever testified that the lights would be visible up to an angle of 8.5° [R. 317 *et seq.*; Ex. P. 43]). Records prepared at the time the tests were performed were introduced as respondent's Exhibits H-15.

Finally, there was the testimony of Chief Petty Officer Bandel, who had served continuously from before the collision to the date of trial as officer in charge of the Coast Guard detachment responsible for the Lake Havasu area. Chief Bandel gave testimony relating to the point of collision, and testified further that in his experience there was sufficient illumination from the lights of Black Meadow Landing *alone* for persons in a boat located at the point of collision to see another boat approaching from shore [R. 401].

We submit, therefore, that there was ample evidence from which to conclude that the lights of the Heiser boat should have been visible to Mr. Pearson prior to the collision and, indeed, that the Heiser boat should have been visible even if it had not been lighted.

So, again, the question must be asked: why did Mr. Pearson not see the Heiser boat prior to the collision? The best answer, we submit, is to be found in Mr. Pearson's own testimony before the Coast Guard proceedings held shortly after the collision, which was repeated at trial:

> "Q. I will refer you, sir, to page 4 of your testimony before the Coast Guard . . . wasn't your testimony as follows:
>
> 'I would say we were approximately two-thirds or maybe almost three-quarters of the way back to where our camp was located when

Mr. Blaney announced that his hat had blown over the side. At this time I pulled the power back and made 180°, turn and we went some distance, and there again, it would be hard to say how far or how long a time but what I judge to be more than the distance we had covered at the higher speed, since his hat blew off. Then he commented, well forget the hat and so I made 180° turn back again going in the initial direction but still going slow *and still looking for the hat,* in case we should run across it. *About this time I felt that I was probably concentrating mostly looking to the left side of the boat,* from which I was driving from and the glow of the lights from a boat anchorage in the Black Meadow area, and also being alert to the point of land that stuck out of the south side of the camping area, separating the boat and dock area from the camping area, being sure we didn't run aground on this point of land, which had a red flashing light on it. I feel that I was also aware of other boats in the area. I know that in the making of these turns that I was certainly looking around and that there were no boats to the best of my recollection. However, there was a boat southbound. After we had again started back to our camping area, it, uh, *again I didn't pay too much attention* but *he* was off to our right. He seemed to be going at a slow speed and I have no idea where he was or anything after that. However, I am aware that there were other boats on the lake. I *stress this to more or less justify or try to justify the fact that I saw nothing of the boat that we had the collision with.'*

Q. Was that your testimony at this time, sir?

A. Yes sir.

Q. And that is correct, to the best of your knowledge?

A. Yes sir." [R. 84-86] (Emphasis added).

Counsel went on to quote from Pearson's Coast Guard testimony in these terms:

> "'He [Blaney] was in the back, that is correct, and to the best of my knowledge he was sitting down. His hat had blown off as we were going at the higher speed and it is my understanding that when I knew I was on the left side of the boat he was looking out the right side of the boat, sitting down, as I explained to you, to your chief, out to the lake. I was sort of holding my head or sighting my—along to get the glare—because that was the only way, —light—there was no moon and the reflected light off the relatively light chop at the time was the only thing we could have seen to hope to find his hat.'
>
> That again was your testimony, was it not? A. Yes sir." [R. 87].

In substance the explanation offered by Mr. Pearson to the Coast Guard for his failure to see Heiser's boat was that he was looking mostly to the left with his head down sighting along the surface of the water in hopes of seeing a hat silhouetted against the glare. Apart from the very dubious theory that Heiser's lights were blocked from view, this was the only explanation before the trial court, and doubtless it is the correct explanation.

III.

The Standard of Care Employed by the Trial Court Was Not Unreasonable.

Section IV(b) of Pearson's brief is devoted, more or less, to the argument that the trial court invoked an unreasonable standard of care in holding him negligent.[2] His thesis seems to be:

(1) That the operative events leading to the collision developed very quickly; and

(2) That it is not reasonable to require a boat operator to keep so diligent a lookout as to be able to observe and react to the operations of other boats in so brief a time.[3]

With respect to the first proposition, we agree—although we submit that appellant overstates his case in suggesting that the court's finding in this connection is not accurate. As appellant indicates, Mr. Cherbak testified that it was not possible, under the circumstances, for him to give an accurate estimate as to how long the Heiser boat was outbound from Black Meadow Landing before the collision. Surely this must be so. Any estimate in seconds made by one of the participants is bound, in the nature of things, to be of dubious reliability. The computations on page 18 of Pearson's brief are no less dubious since they assume a constant speed of 20-30 miles per hour. The only evidence on

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[2]It is worth noting that Pearson also charges the trial court with having failed to use the correct evidentiary standard; which is, we are told, that the evidence against Mr. Pearson should have been proved "beyond a reasonable doubt" (P. Br. 26) . This extraordinary assertion requires no comment from us: it falls of its own weight.

[3]Pearson's third proposition, *viz.*, that even if he had seen Heiser's lights he could not have avoided the collision, is properly a proximate cause question and is discussed in that context, *infra,* at 14.

point is that Heiser's boat was stopped at Black Meadow Landing [R. 219]; that Heiser applied power gradually, without coming to full throttle [R. 222, 242]; and that his boat did not reach a speed of 20-23 miles per hour until just moments before the collision [R. 242, 258]. During this period the boat traversed a distance of 900 to 1,000 feet. Mr. DeFever, Pearson's expert, testified that, as one of his experiments, he accelerated his boat "rapidly", coming to *full* throttle "immediately" [R. 375]; and that in so doing he achieved the results set forth in Exhibit P. 43 (p. 28) which indicate that, even under conditions of maximum acceleration, his boat covered no more than approximately 575 feet in thirty seconds. Clearly, by accelerating at a normal rate to less than full speed, Heiser must have been considerably longer in traveling to point of impact. The court's finding that this period was approximately one minute is well supported by the evidence and can hardly be said to be clearly erroneous.

But the general point remains true. On narrowly confined waters, trafficked by highly-maneuverable speed boats, dangerous situations can develop with dramatic suddenness. A person operating a boat capable of speeds of more than 30 miles an hour on a lake occupied by other boats of like capability normally has less than a minute—seconds—within which to react. There is nothing unusual in this. It is a fact of life on our streets and highways—and in the air traffic patterns frequented by appellant as an airline pilot.

Appellant cites several cases for the proposition that the lookout requirement must not be applied rigidly (P. Br. 21-23). We certainly agree, although it is appropriate to note that each of these cases involved large ship collisions. Clearly, the standards appropriate to

collisions between large ocean vessels, where slow speed, momentum, lack of maneuverability, and long distance combine to impart a slow motion quality to the scene, do not apply here. As the court in *Stevens v. United States Co.,* a case noted on page 21 of appellant's brief, stated:

> "[T]he quality and diligence of the lookout requirement depends upon the degree, and imminence of the danger reasonably to be anticipated."
>
> 187 F. 2d 670 at 674 (1st Cir. 1951).

Two boats of the type which frequent Lake Havasu, and which are involved in this case, are capable of achieving a closing speed of roughly 60 miles per hour or more—or covering a distance of upwards of a mile in the space of a minute. Accidents, when they occur, will rarely, if ever, be in the making for more than a minute. If the standard of diligence required in operating such craft permitted one to relax his vigilance for periods of up to a minute, then the standard would be meaningless. We submit that vigilance which is not attuned to the needs of the situation is inadequate—in a word, is negligence.[4]

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[4]The trial court found that while appellant was negligent he was not "grossly" negligent. From this it follows that he was not directly liable to the wrongful death claimants whose decedents were guests in his boat. While general maritime law does not provide a remedy for wrongful death, it does "adopt" state wrongful death acts where, as here, death occurs on inland waters. *Western Fuel Co. v. Garcia,* 257 U.S. 233, 42 S. Ct. 89 (1921). In so doing, however, admiralty courts are obliged to enforce the right as an integrated whole with all state created limitations, such as the Guest Statute, attached. *The M/V TUNGUS v. Skovgaard,* 358 U.S. 588, 79 S. Ct. 503 (1959). Appellee Stamper sued for personal injuries, not for wrongful death, and, accordingly, was not subject to the Guest Statute limitation. To suggest, as appellant does at page 13 of his brief, that the district court's judgment somehow did violence to California law is unjustified—it was not applying California law.

IV.

Under the Rules of Navigation, Pearson's Was the Burdened Vessel.

The assertion (P. Br. 14) that the Heiser boat was the burdened vessel, and that Pearson could not be faulted under conventional crossing rules is demonstrably without merit. The trial court found, on ample evidence, that the Heiser boat approached Pearson's starboard bow [F. 16]. Both Pearson and Heiser testified that they were on steady courses prior to the collision. Under the circumstances, appellant was required under the Rules of the Road to yield to Heiser. The rule is:

> "When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other." (Steam vessels are any vessels propelled by machinery.)
>
> 33 U.S.C.A. 154-155.

It was Pearson's boat, therefore, that was the burdened vessel and not Mr. Heiser's. The fact that rules of navigation pre-suppose that vessels are visible to one another is true, but hardly germane, since the evidence established that Heiser's boat should have been visible to Mr. Pearson.

It is, perhaps, a little academic to stress crossing rules here: one does not yield the right of way to a boat one never sees. This does not, however, effect one's *duty* to do so. Obviously, no rule can rationally be followed if boat operators are not observant; if they fail to note the courses of other boats. Failure to keep sufficient lookout does not exonerate them from their fail-

ure to follow the rules. It simply means that they are doubly responsible; first, for failure to see the other boats, and then for their failure to carry out the rules. *Curtis Bay Towing Company v. Sadowski* (4th Cir. 1957), 247 F. 2d 422, 1957 A.M.C. 1847. It is obvious that, if a boat is obliged to give way to other boats coming from the right, it is of particular importance that the operator keep an adequate lookout to the right. A lookout which is directed predominantly to the left is of singularly little value in this connection.

V.

Pearson's Fault Was the Proximate Cause of the Collision.

It is quite well established that:

> "[W]here a vessel has been guilty of departure from the rules or of other fault, she bears the burden of going forward with evidence to show that her fault did not cause or contribute to the collision. . . ."
>
> Griffin, On Collision, § 24 at 40.

See, *e.g.,*

Esso Standard Oil Co .v. Oil Screw Maluco I, 332 F. 2d 211 (4th Cir.);

The Salutation, supra, at 4.

In our case each boat operator had the burden of showing that his faults were not causally related to the accident. Both failed.

Pearson argues that his fault could not have proximately caused the collision because Heiser's "glaring", "inexcusable" fault was alone sufficient to account for the accident (P. Br. 10-11). This surely is specious. the law *does* comprehend the concept of dual causation. The fault of two or more persons *can* contribute

proximately to an accident. When two vessels, both underway, collide without seeing one another no other conclusion is possible than that the fault of each contributed to the casualty.

We do not understand how the fact that appellant believes Mr. Heiser's fault was "glaring" or "gross" affects this situation. Implicit throughout appellant's brief is the assumption that one need only attach a pejorative label to another's conduct to be immune from criticism one's self. To this we can only say:

(1) The adjectives employed by Mr. Pearson are his alone. The court rejected his proposed finding of fact that Mr. Heiser's fault was "gross" [C. 77]. It went no further than to find that both boat operators were at fault, and that the fault of neither could be classified as minor [F. 22].

(2) The concept of comparative negligence is not relevant to any issue in this case, including the proximate cause issue. As Messrs. Gilmore and Black note in *Laws on Admiralty:*

> "[A]merican law makes no provision for dividing fault—or damages—on a sliding scale of percentages. A vessel is either at fault or not at fault, and the effect of fault is never graded."
>
> *Id.* at 402.

See, *e.g.*, cases cited, *infra*, at 24 *et. seq.*

Elsewhere in arguing this topic, appellant asserts that *if* he had seen the Heiser boat he *might* not have been able to avoid the collision. We are told that:

> "With the white light invisible and the bow light alternating between red and green, there was no way in which the most experienced mariner could have determined the course of Heiser as he approached. . . ." (P. Br. 20).

This statement is completely at odds with the evidence and the court's finding. Even appellant's expert, DeFever, did not assert that the angle of Heiser's bow blocked off the stern light. The testimony was clear that Heiser followed a direct course to the point of collision. It follows, therefore, that both the red and green running lights of Heiser's boat should have been steadily visible to persons forward of Heiser's bow. If appellant had been looking, he would have seen both the red and green lights approaching from starboard which would, or should, have indicated to him that he was on a collision course with a boat that had the right of way; a boat that did not suddenly materialize seconds before collision—but one, rather, than had been on a steady course for more than enough time for appellant to have executed the appropriate maneuvers. Pearson's boat was highly maneuverable. It could, according to Mr. Pearson, achieve a top speed of more than 30 m.p.h. very quickly, and could turn in its own length or less [R. 111, 123]. The Pearson boat was 13⅓ feet long; it was struck in an area 6 inches to 2½ feet back from the bow [R. 33, Ex. P. 43 at 4]. Had it stopped, reversed, increased its speed forward, or turned in either direction at any time up to within a few seconds prior to the collision—the collision would not have occurred.

Appellant's concluding statement—that "no evidence was offered that any evasive action could have been effective" is not correct (P. Br. 20). The facts regarding Mr. Heiser's course, the period during which he

followed that course, the speed and operating characteristics of Pearson's boat, were all before the court. A more accurate statement would be that no evidence of any substance was offered by appellant to establish that evasive action could *not* have been taken; and it was upon appellant that the burden in this connection rested.

VI.

The Trial Court Did Not Err in Refusing to Apply the Major-Minor Fault Concept.

It is easier to state what the major-minor fault rule is not than what it is. Its essence is summed up as well as possible by Gilmore and Black in *Laws on Admiralty*, page 402 *et seq.*, as follows:

> "Where the fault of both vessels causes the collision, the damages are divided—that is to say, such a decree is entered as shall have the effect that each bears half the total damages. In effect, this involves a payment by the less injured to the more injured vessel.
>
> "It will be noted that the American law makes no provision for dividing fault—or damages—on a sliding scale of percentages. A vessel is either at fault or not at fault, and the effect of fault is never graded. Nevertheless, the operation of the so-called 'major-minor fault' rule sometimes mitigates the harshness of a doctrine which would divide damages equally in the case where one vessel is grossly negligent while the other is at fault, if at all, only in some technical sense. In such cases, the courts have sometimes announced their intention to resolve all doubts in favor of the comparatively innocent vessel, shutting their eyes to

what might under other circumstances have been regarded as fault, or have found that, in view of the grossness of the fault of one vessel, the minor error of the other cannot be said to be a contributory cause of the disaster.

"One way of stating the major-minor fault principle may be quoted from a leading Supreme Court case:

> '. . . Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor.'

"The major-minor fault 'rule' is vague and unreliable; in many cases a decree for evenly divided damages has been entered where the fault of one vessel was out of all proportion to that of the other. So in Tide Water Associated Oil Co. v. The Syosset, one of the vessels, the Tycol, was guilty of so many and such gross faults that the appellate court said:

> 'We need not burden this opinion with a recital of the litany of the Tycol's many acts and omissions from which the district court concluded that she was to blame, for she concedes her fault.'

"Among other things, she seems to have been showing her red and green side lights alternatively,

in a sort of winking pattern, the consequence, apparently, of her electing to pursue a zig-zag course. Confronted with this widely erratic navigation. the master of the other vessel failed to signal immediately (as required by one of the Rules of Navigation) that he did not 'understand the course or intention' of the Tycol. The court, holding the non-signaling Syosset for half-damages, said:

> 'Nor is the major-minor fault rule of any help to the Syosset. It is true that, were we free to apportion damages according to the degree of fault as is done by those countries which have adopted the Brussels Collision Convention of 1910, we would probably agree that a 50-50 division of damages here would be unjust. But even then we certainly could not say that the Tycol should bear 100% of the damages. The discussion above shows that the Syosset's failure to sound the danger signal *immediately*, when in doubt as to the Tycol's course or intention, had more than a minor part to play in causing the collision. Therefore, under the rule administered in American admiralty, she must bear half the damages."

Feige v. Hurley, 89 F. 2d 575 (6th Cir. 1937) is probably the closest case to ours on its facts, although it does not talk about the rule. *Feige v. Hurley* is a case where Hurley was operating a Chris Craft motorboat with a 70 horsepower motor capable of going 35 miles an hour. While crossing the Ohio River, from the Indiana shore to the Kentucky side, at 22 or 23 miles an hour, he encountered a canoe 15 feet ahead. He put the wheel hard over, put his boat in reverse, struck

the canoe. The canoe was unlighted. The night was dark. It was held that Hurley was at fault for going at an excessive speed. It was held that the deceased, who was guiding the canoe, should have seen the other boat. The court held that both were at fault, and therefore denied a recovery for wrongful death to the deceased, saying (89 F. 2d at 577):

> "The deceased, who was guiding the canoe, should reasonably have expected the presence of other craft upon the river and have foreseen the danger of a collision. He should therefore have exercised the utmost care. It was his duty both to look and listen and he was charged with the knowledge of what he might have discovered. The inference is that neither he nor any of the canoe party were either looking or listening. If they had looked they could have seen the lights of the approaching boat. If they had listened they could have heard the roar of its motor, which, under the evidence, was audible for at least 300 or 400 yards."

The court says nothing about major or minor fault: had it deemed the rule applicable, there is no reason why it would not have permitted a recovery by the operator of the canoe.

Where boats come into collision, because an operator is doing something else, and hence fails to keep a lookout, the major-minor fault rule has nothing to do with the case—this itself is a "major" fault.

> *Curtis Bay Towing Company v. Sadowski,* 247 F. 2d 422, 1957 A.M.C. 1847 (4th Cir. 1957);
>
> *Esso Standard Oil Company v. Oil Screw Maluco I,* 332 F. 2d 211 (4th Cir.).

In *Curtis Bay Towing Company v. Sadowski, supra,* we have a comparable case. In that case two tugs were on crossing courses. One, the Gremlin, was the "burdened vessel"—*i.e.,* she had the Mareco on her starboard side (as Pearson had Heiser on the starboard side). Neither saw the other. The reason was that the Mareco—the "privileged vessel"—was watching another boat—as Pearson was watching the peninsula for the hat.

In that case the owner of the Mareco had a far stronger case than does Pearson. The Mareco, after all, in a crossing situation, was required to maintain course and speed. In our case, on the other hand, since Heiser was on the right, Pearson was "burdened". As here, major-minor fault was urged. The District Court applied the major-minor fault rule on the ground that even if the Gremlin's operator had seen the Mareco, he was entitled to assume the Gremlin would yield the right of way to Mareco (*Sadowski v. Tug Gremlin,* D. Md. 1957, 1957 A.M.C. 256, 147 F. Supp. 869.) The court of appeals reversed, saying:

> "We are of the opinion that it must necessarily follow that a vessel, though she be privileged, must, through the maintenance of a proper lookout, preserve for herself the ultimate opportunity of escaping her predicament and avoiding the disaster by the exercise of experienced nautical judgment, when it has become apparent that the burdened vessel will be unable to avoid the collision."
>
> 247 F. 2d at 425.

The same results follow *a fortiori,* when, as here, danger comes from the right side—from which other boats have the right of way—not the left. We submit

that this case—so much stronger than Pearson's for the boat which failed to look out—establishes, beyond doubt, that one cannot claim "major-minor fault", having blindly moved ahead.

Again, in *Esso Standard Oil Company v. Oil Screw Maluco I, supra,* we have a stronger case for major-minor fault than Pearson's. Yet the major-minor fault rule was not applied. In that case a tanker took the wrong side of the channel—went up the left side of the street, as it were. The tanker had no proper lookout. The tugboat also, however, did not look out. Nonetheless, the District Court held the tanker solely at fault under the major-minor fault rule. The Court of Appeals reversed, saying (332 F. 2d at 213):

> "I. With the liability of the tanker admitted, the next inquiry is the behavior of the tug. She was at fault in many respects, but none so flagrant as the absence of a special lookout on the scow or at least in not otherwise providing sufficient observation when nearing the dam. Art. 29, Inland Rules of Navigation, 33 U.S.C. § 221, declares:
>
> > 'Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequence of any neglect to carry lights or signals, or of any neglect to keep a *proper lookout,* or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case. * * *'
>
> '[P]erformance of lookout duty,' Judge Soper declared for us in Anthony v. International Paper Co., 289 F.2d 574, 580 (4 Cir. 1961), 'is an *inexorable* requirement of prudent navigation.'

"While this circuit has not gone quite as far in equating this neglect with a violation of the rules of the road, Judge Soper in the Anthony case further stated the consequence of the neglect in this way:

'[W]e hold that the omission to perform this duty is *so grave a default as to give rise to a strong inference that it contributed to the accident and to impose upon the vessel the heavy burden to show by clear and convincing evidence that it did not so contribute.* Such a holding is surely justified in view of the more drastic rule laid down by experienced admiralty courts as a necessary safeguard for careful navigation.'" (Emphasis in the original).

And again, the court said at p. 215:

"The major-minor fault rule invoked by the District Judge in exculpating the tug we need not discuss. While the offenses of the tanker were grave, the failings of the tug were not minor, and certainly not so insignificant as to be eclipsed beyond consideration."

Other cases, in some degree comparable to ours, where the "rule" was rejected are:

Tanker F. A. Verdon, Inc. v. Stakeboat No. 2, 340 F. 2d 465, 1965 A.M.C. 544, 548 (2d Cir. 1965);

Gary v. The Echo, 334 F. 2d 199, 1964 A.M.C. 2326 (4th Cir. 1964);

Eastern S.S. Co. v. International Harvester Co., 189 F. 2d 472, 476 (6th Cir. 1951);

Tide Water Associated Oil Co. v. The Syosset, 203 F. 2d 264, 268-69 (3d Cir. 1953).

We believe that the results described above are hardly escapable, for the rule has been restated time and again that if two boats are at fault, damages are divided 50-50, and degree of fault makes no difference.

The Atlas, 93 U.S. 302, 313-14 (1876);

Diesel Tanker F. A. Verdon, Inc. v. Stakeboat No. 2, 340 F. 2d 465 (2d Cir. 1965);

Esso Standard Oil Co. v. Oil Screw Tug Maluco I, 332 F. 2d 211 (4th Cir. 1964);

N. M. Paterson & Sons, Limited v. City of Chicago, 324 F. 2d 254 (7th Cir. 1963);

Tank Barge Hygrade v. The Gatco New Jersey, 250 F. 2d 485 (3d Cir. 1957).

What then does the major-minor rule do? Without exception, it would be found to apply only in cases where there is no fault, or where the fault was not a contributing cause of the collision. Little wonder that in *Boyer v. The Merry Queen,* 202 F. 2d 575 (3rd Cir. 1953), the court said:

> *"This rule is of little help in deciding cases.* It has been observed that it is artificial and misleading unless very carefully applied [citing cases, including *The Admiral Schley,* 131 Fed. 433, aff'd 142 Fed. 64, cert. den., 201 U.S. 648] where it is pointed out that in many cases the rule would operate in reverse direction depending upon which vessel's faults were first considered in determining the cause of the collision." (Emphasis added.)
>
> *Id.* at 579, footnote 11.

In *The Admiral Schley,* to which *Boyer v. The Merry Queen* refers, the court denied applicability of the rule, and pointed out the absurdity of permitting the rule

to produce different results depending on where one starts.

How is one to decide between first determining, for example, that Pearson was at fault for failure to keep a proper lookout, and then debate the significance of the major-minor fault rule in considering the effect of Heiser's speed, in preference to first considering Heiser's speed, and then debating the application of the major-minor fault rule to Pearson's poor lookout? The fact is that failure to keep a lookout—failure to see what was there, and the resultant failure to observe the rules for navigation with another boat on the right, was a serious fault which palpably contributed to the loss. Under those circumstances, the major-minor fault rule has nothing to do with the case.

Conclusion.

The evidence presented at trial was more than sufficient to support the trial court's finding that appellant Pearson was negligent and that his negligence was a proximate cause of the collision. We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WINCHESTER COOLEY III,